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CURRENT TOPICS

Law Society for Scotland

THE parallel Bill in Scotland to the Legal Aid and Advice Bill in England is the Legal Aid and Solicitors (Scotland) Bill. One of its most interesting features is found in cl. 7, which imposes the responsibility for making a scheme under the Act upon the Law Society for Scotland. As readers may know, there has hitherto been more than one Law Society in Scotland, and some eminent Scottish authorities have viewed with apprehension the establishment of a single Law Society, as a step towards nationalisation of the profession. It is possible, therefore, that there will be some debate on Pt. II of the Scottish Bill, which establishes "The Law Society for Scotland." When the society has been established, no solicitor will be entitled to practise unless he holds a practising certificate from it. The council are required to make rules providing, *inter alia*, for the keeping by solicitors of separate accounts for their clients' moneys, and the society must establish a guarantee fund to compensate persons who incur pecuniary loss by reason of dishonesty on the part of practising solicitors. There are also provisions in Pt. II of the Bill dealing with discipline, the employment of disqualified solicitors, and the taking of apprentices. So far as Scotland is concerned, much of this is revolutionary, and, certainly, some of the familiar old-fashioned differences between the English and Scottish systems will vanish when the Bill becomes law, but it is difficult to see how any useful scheme of legal aid in Scotland can be a practical success without these changes.

Sharing Stock Exchange Commissions

SHORTLY after we went to press last week it was announced that the need for a poll of members of the Stock Exchange had been averted by a temporary compromise at the members' meeting held on Thursday, 25th November, which was the most heavily attended within memory. The chairman announced that the Governor of the Bank of England had invited the chairman and the deputy chairman of the Council of the Stock Exchange and of the Committee of Clearing Banks to meet him in conference, and had suggested postponement of action for three months to allow further examination of the points in dispute. The chairman of the Stock Exchange considered that agreement might be possible if the bank trustee departments were allowed return of commission in respect of older trusts where there was no power to charge for security dealings. An emergency meeting of the Council was called, and on the opening of the members' meeting at 3.15 p.m., a motion by the chairman to adjourn it for three months was carried. If agreement is reached in this breathing space, it seems that agreements may follow after discussions with the Public Trustee, solicitors and others. In the meantime, the chairman of the petition committee of members of the Stock Exchange is to be kept informed by the Council of any tangible results of negotiations with the banks.

Witness Actions in the Chancery Division: New Practice Direction

THE judges of the Chancery Division have issued a further Practice Direction supplemental to that of 7th July, 1948 (*ante*, pp. 382, 396) relating to the fixing of dates for the hearing of witness actions. All available dates having now been allocated down to 18th March, 1949, the new Direction (set out at p. 692, *post*) states that after 3rd December, 1948, no appointments will be given to attend before the Master in Charge to fix a date for trial, but that such appointments will be resumed on and after 9th February next year. It should, however, be noted that an application for special consideration in a case of exceptional urgency may be made at any time. The Direction adds a reminder that paras. 6 and 7 of the original Direction, as to altering dates already fixed and notifying settlements, remain unaffected.

Town and Country Planning Act, 1947: Claims on Global Fund

THE Central Land Board published notices on 24th November, 1948, which will be of interest to readers concerned with claims under Pt. VI of the Town and Country Planning Act, 1947. The first states:—"In answering question 14 of the claim form S. 1, claimants need not, unless they wish to, supply any of the detailed information if the date for the purpose of answering any of the sub-heads (*a*), (*b*) or (*c*) was before the 1st January, 1919. In answer to each sub-head the words 'before 1919' can be used without any other information." The second notice deals with claims in respect of freehold or leasehold land subject to a contract of sale on the 1st July, 1948. It states that in those cases the right to receive a payment from the £300 million fund vests in the vendor as the legal owner of the interest subject to the provisions of the Treasury Scheme. Under s. 58 (4) (*a*) of the Act, the Treasury Scheme may (and the Board are authorised to state that it will) provide, by the adoption of the principles of s. 30 of the War Damage Act, 1943, that the vendor shall, subject to any specific provision in the contract affecting the disposition of the payment, hold the payment

in trust for the purchaser. The vendor and the purchaser are recommended to agree that one of them only should claim. If both do so any contribution by the Board towards professional fees will be made to the vendor only. If the vendor is not willing to claim, the Board will not reject a claim made by the purchaser, if the special nature of his interest is given in the question in the claim form headed " Other Interests."

Land subject to Mortgage

As regards claims in respect of freehold or leasehold land subject to a mortgage on the 1st July, 1948, a further notice states that under s. 64 of the Act the right to receive a payment from the £300 million fund vests in the owner of such an interest, subject to the provisions of the Treasury Scheme. Under s. 58 (4) (*a*), the Treasury Scheme may (and the Board are authorised to state that it will) make provision for the protection of the mortgagee on the general lines of that made in s. 24 of the War Damage Act, 1943. This protection will depend on a valid claim having been made in due time. A mortgagee cannot normally claim in respect of his interest as such. The mortgagee should therefore take steps to see that the owner makes a claim. All claimants are required on the claim form to give particulars of any mortgage, and the Board will inform the mortgagee of the receipt of the claim when these particulars are given. If the owner should be unwilling to make a claim, the Board will not reject a claim sent in by a mortgagee in the name of the owner unless the owner subsequently objects. The owner's name should be given in question 1 of the form, the questions in the remainder of the form should be answered with reference to the owner's interest, and the mortgagee should sign the claim form " on behalf of " the owner. The notice further states that, if the owner and the mortgagee both submit claims, any contribution by the Board towards professional fees will be made to the owner only. If the mortgagee has taken an assignment of the right to receive a payment, notice of the assignment should accompany the claim form.

Articled Clerks and National Insurance

FURTHER light on the subject of articled clerks and the National Insurance Act has now become available by reason of the publication of the National Insurance (Contributions) Regulations, 1948, and of a statement published in the *Law Society's Gazette* for November, 1948, and approved by the Ministry of National Insurance. The statement divides articled clerks into two categories, those in receipt of remuneration and those not in receipt of remuneration. The former, it is said, are liable to pay contributions while the latter are exempt for any week while they are receiving a full-time education or full-time unpaid apprenticeship. They may, however, if they wish, pay contributions for such weeks as non-employed persons. If such an articled clerk is under the age of eighteen, a contribution must be credited to him for any such week. If, concurrently with his articles, the clerk is engaged in some other gainful occupation, any liability in respect of that occupation will not be affected. Every articled clerk must be insured under the National Insurance (Industrial Injuries) Act, 1946. If he receives remuneration from his principal then half of the contribution may be recovered by the principal from the articled clerk. If the articled clerk is not paid by the principal, then there is, it is stated, no such right of recovery.

Sub-delegated Legislation and Requisitioning

IT is surprising that, in spite of the strongly expressed view of the Court of Appeal in *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349, on the subject of the non-publication of delegated power to requisition property, there still appears to be ground for public complaint. Mr. Justice STREATFEILD renewed attention to the matter in *Patchett* v. *Bradford Corporation*, on 19th November, in which the plaintiff claimed an injunction against trespass on her property. A requisition notice had, it was alleged, been " slipped in " when one person had left and before his successor had a chance to take possession. It was claimed that the requisitioning notice was void. After examining at some length the circulars concerning requisitioning issued by the Ministry of Health, his lordship expressed complete agreement with the view expressed in *Blackpool Corporation* v. *Locker*, *supra*, and said that sub-delegated legislation was at least four times cursed. It was not published and was inaccessible even to those whose valuable property rights were affected. The circulars were expressed in the colloquial language of correspondence and not in the precise language of an Act of Parliament. The town clerk had a difficult task in understanding them, and his *bona fides* was unassailable, but he and his officers should have taken more care to ascertain who was the owner of this property before the requisitioning. His lordship granted a declaration that the requisitioning notice was void and ordered that there should be an inquiry as to damages in the event of failure to agree.

The Children Act, 1948: Voluntary Homes

VOLUNTARY homes for children in England and Wales must be registered with the Home Office before 1st January, 1949. It will be illegal to carry on an unregistered voluntary home after that date. The mode of registration is prescribed in the Voluntary Homes (Registration) Regulations, 1948 (S.I. 1948 No. 2408). All the known organisations conducting such voluntary homes have received forms of application for registration, and any person who is carrying on or intending to carry on what may be a voluntary home and who has not received a form of application for registration should apply to the Home Office, Whitehall, London, S.W.1.

The Legal Aid Bill

WE publish elsewhere in this issue an article which raises a number of weighty criticisms against the Legal Aid and Advice Bill in its present form. Believing as we do that the introduction of the Bill is an event of the highest significance for all our readers, and that it is of the utmost importance that its provisions in their final form shall command the greatest possible measure of agreement among those who will have to operate them, we consider it the duty of THE SOLICITORS' JOURNAL to present as wide a selection of views on the Bill as possible, whether or not we share those views. It is no disparagement of the Bill as presented to say that in the course of its passage through Parliament improvements will undoubtedly be made; but a perfect instrument can be forged only if the combined wisdom of the whole profession is brought to bear on the scheme.

Recent Decisions

In the Court of Appeal (TUCKER and ASQUITH, L.JJ., and HARMAN, J.), on 23rd November (*The Times*, 24th November), it was held that a person who was convicted of an offence against reg. 4 of the Defence (Finance) Regulations, 1939, was thereby disqualified under the articles of association of a limited company from serving as a director of the company, because they disqualified a person from acting if he was " convicted of an indictable offence," and the mere fact that the person was dealt with summarily did not make his offence any the less indictable.

In *Henley* v. *Cameron* the Court of Appeal (TUCKER and SINGLETON, L.JJ., ASQUITH, L.J., dissenting), on 22nd November (*The Times*, 23rd November), held that where a motor cyclist collided in the dark with an unlighted and stationary motor car there was a reasonable inference that the failure to provide the required light was a cause contributing to the accident, and the defendants were therefore guilty of negligence. The court also held that the motor cyclist had been guilty of contributory negligence and reduced the damages by one-third, as representing the motor cyclist's share of the responsibility. The court held that the proper direction to the jury in such a case was that laid down by Lord Birkenhead in *The Volute* [1922] 1 A.C. 129.

THE LEGAL AID BILL: SOME CRITICISMS

THE Rushcliffe Committee on Legal Aid presented their Report in May, 1945. Their recommendations met with a general welcome and were accepted in principle by the Government, but certain aspects of the scheme were the subject of criticism, and it had been hoped that the delay in introducing legislation was accounted for by the fact that efforts were being made to meet these criticisms. It cannot be said that these hopes have been realised; indeed, in many respects the defects of the Rushcliffe Scheme have been accentuated.

The most obvious and important defect is in the extent of legal advice which can be provided at the legal aid centres. It is expressly provided that this shall be limited to *oral* advice. Experience of running a poor man's lawyer centre has shown that, if real help is to be given, something more than oral advice is essential in about one-third of all applications, and at present in some centres such aid is freely given and correspondence and negotiations carried on for the applicant. The average applicant is quite incapable of carrying on legal correspondence or negotiations and oral advice alone will not enable him to do do. On the other hand, a single letter from the centre (e.g., requesting particulars of the standard rent) or a short correspondence and an interview with the other side will often satisfactorily dispose of the whole matter. Thus, if the applicant to such a centre has been injured in a road accident, the centre write to the driver asking him to put them in touch with his insurance company, a meeting takes place with a representative of the company and in the vast majority of cases the claim is settled with very little trouble to all concerned. It must, of course, be admitted that it is only in a few centres that such a service is at present provided, but it is submitted that a satisfactory nation-wide scheme must ensure that similar facilities are available universally.

On the contrary, the Bill as at present drafted appears to proceed on the fallacy that nothing is needed between oral advice on the one hand and aid in litigation on the other and no arrangements whatever are made for the vast hinterland lying between these two extremes. It is provided that the solicitor at the centre shall be allowed to do no more than give oral advice and, if necessary, assist the applicant in completing an application to the Certifying Committee for legal aid in litigation. Hence what will apparently occur in future in a running-down case of the type referred to above is something like this: The applicant will approach the centre, the centre will either have to advise him to negotiate himself with the driver's insurer or, and this will obviously occur in the vast majority of cases, will decide that the applicant needs legal aid. The centre will then help him to complete an application to the Certifying Committees which may decide that he has a *prima facie* case (it is difficult to see how they can be sure of that at this stage unless the applicant has himself obtained statements from witnesses—another task much better done by a solicitor). He will then have his means investigated by the local officers of the National Assistance Board who will decide how much he can afford to contribute towards the litigation which it is assumed (probably erroneously) will ensue. Eventually, and perhaps after months of delay, he will be able to select a solicitor on the panel who will then proceed to settle the claim out of court just as is done at present by the centre itself. In the meantime a substantial amount of public money will have been wasted and an entirely unnecessary strain placed upon the resources of the local committees. In the example given it is assumed that the applicant ultimately obtains satisfaction, but there will be many cases where the centre will rightly feel that no reference to the Certifying Committee is possible as there is nothing in the nature of impending litigation. Are the committees going to be bothered whenever the landlord has failed to give the prescribed particulars in the rent book, or with every quarrel between adjoining tenants? If not, how are applicants to be satisfied? Every poor man's lawyer knows that a stiff letter from the applicant himself (even assuming that he is capable of writing one) is likely either to be ignored or to add fuel to the fire, whereas a letter from a solicitor will often resolve all difficulties. Under the new arrangements there seems to be no means of obtaining such a letter.

It is therefore submitted that the provisions of the Bill, so far as they relate to legal advice, are profoundly unsatisfactory. Nowhere will they provide an adequate service, and in certain areas the new service will be even worse than the old. In this respect the Bill is even less satisfactory than the Report which expressly declared that if the matter could probably be dealt with by writing a letter, the centre should write that letter and that only if negotiations were likely to ensue should application be made for a legal aid certificate. This would have been better, though still not good enough.

So far as concerns aid in litigation, there can be no doubt that the Bill is a vast improvement on the present Poor Persons Procedure. At the same time it presents certain features which seem unfortunate or unfair.

The first of these concerns the contribution towards costs which the applicant may be required to make out of capital. The recommendations of the Rushcliffe Committee were severely criticised on this point and something has been done to meet these complaints. The committee thought that the applicant should be liable to contribute his "disposable capital" in excess of £25, in the case of a single man, and £50, in the case of a married man. The Bill increases the limit to £75 and allows a further £75 for dependants. Moreover "disposable capital" will not normally be regarded as including the value of the house in which the applicant resides or his furniture or other household possessions. Even so, grave hardship may be caused. The explanatory memorandum issued with the Bill instances the case of a man who has saved £300. If he has no dependants he will be liable to contribute £225 and if he has dependants, £150. It is surely obvious that such a man cannot afford to gamble the greater part of his life savings in this way. Nor does this seem to be the best way of encouraging thrift and combating inflation, for if the same applicant had spent his money on more expensive furniture, he would not normally be liable to make any contribution.

Another point which causes some disquiet is the possible liability of an unsuccessful assisted litigant for the costs of the other side. The Bill, following the Report, provides that he will be liable for the costs of the other side to such extent as the court may consider reasonable having regard to his financial circumstances and that for this purpose the house in which he lives, his furniture and the tools of his trade will be left out of account. This means that, at any rate in theory, he may be ordered to pay costs in excess of the amount which the Assistance Board have determined as the maximum which he can fairly be called upon to contribute. Why should he run the risk of being ruined in this way? He must already have satisfied the Certifying Committee (qualified lawyers) that it is reasonable for him to fight the case and in these circumstances it is submitted that his maximum liability should be determined once and for all by the Assistance Board. Admittedly it is unfair to the successful party that he should lose his costs, but the logical answer is that his costs should in all cases be paid out of the legal aid fund, a solution which has presumably been rejected on the ground that it would impose too great an expense on the national revenue. The present solution seems thoroughly unfair to both parties; the unassisted party will be liable for full costs if he loses but will normally not recover them if he wins, and in the rare cases in which he does recover, it will be at the expense of the assisted litigant who can therefore never be certain what his maximum liability will be.

The Bill, amending slightly the committee's recommendations, provides that in county court cases the lawyers shall be entitled to the full amount of their taxed costs but that in the High Court, Court of Appeal and House of Lords the amount recoverable by them shall be reduced by 15 per cent. This

15 per cent. reduction seems an unfortunate piece of cheese-paring. As costs are taxed on a solicitor-and-client basis it is not suggested that it will normally impose any great hardship on the solicitor (except perhaps to the London agent) but it seems objectionable that one and the same office should deal with one set of clients on one scale of remuneration and with another on a lower scale. It is most improbable that the latter will in fact be given less attention, but justice should not merely be done but should manifestly appear to be done, and while this difference remains the assisted litigant is bound to doubt whether he is getting the same treatment.

If, however, it is necessary for financial reasons to maintain this invidious distinction, then it is suggested that its effects could at least be mitigated. If the assisted litigant is successful and is awarded costs, these will be taxed on a party-and-party basis and paid in full into the legal aid fund. The solicitor will then have to tax his bill on a solicitor-and-client basis and will recover such costs less 15 per cent. It may well be that solicitor-and-client costs less 15 per cent. will be less than the party-and-party costs recovered from the other side. Surely it would be fair to give the solicitor the option of recovering these party-and-party costs instead? If this were done it would give him the opportunity of avoiding at least one taxation, and possibly two, because he could then seek to agree the party-and-party costs without taxation. There is no doubt that the bogy of double taxation in every case is the feature which, more than any other, is going to deter solicitors from entering the scheme. This is unfortunate because the success of the scheme depends wholly on the extent to which the profession participate in it so that the poor can no longer feel that the best remains barred to them like the grill-room of the Ritz hotel.

It is not suggested that these are the only features of the Bill to which exception can be taken. But is is thought that they are the most important and those to which attention should be drawn while there is still time to correct them. While the Bill is an important contribution towards social security and justice, nevertheless it is felt that, as at present drafted, it contains the seeds of failure, which must not be allowed to take root.

L. C. B. G.

PLANNING APPEALS PROCEDURE

THE tide of planning appeals is at present flowing strongly, and the purpose of this article is to describe the procedure connected with them.

The appeals concerned are those against—

(1) the refusal by the local planning authority of planning permission for development; or

(2) the imposition by the authority of conditions on a planning permission, where such conditions are *ultra vires* or unreasonable; or

(3) the failure of the authority to give notice of any decision on a planning application within the appropriate time or of its reference to the Minister of Town and Country Planning.

The procedure is laid down in s. 16 of the Town and Country Planning Act, 1947, and art. 11 of the General Development Order, 1948 (S.I. 1948 No. 958).

Notice of appeal must be given to the Minister within one month of receipt of the notice of the decision in cases (1) and (2) or one month of expiry of the appropriate period (for which see art. 5 (3) of the Order) in case (3). Notice must also be given to the local planning authority that an appeal has been made.

No form of appeal is prescribed, but the Ministry supply a form of appeal (Form T.C.P. 201) on which the appeal may be made. The completion of this form will assist the appellant's solicitor to make sure that he has sent to the Ministry all relevant documents and information, so the first step is to obtain the forms. If, on the other hand, the month is running out and there is not time to obtain them, an informal notice of appeal by letter in the first place will apparently be good.

The period of one month within which notice must be given may be extended by the Minister, and an extension may be given even after the month has run out if there are proper grounds on which to grant it. No power is given to the local planning authority to extend it, but appellants often seek their consent to an extension.

The form of appeal (T.C.P. 201) has to be completed and returned in duplicate to the Ministry. Little difficulty will be experienced in completing it except for the part labelled "Precise grounds of appeal." These should be carefully thought out, for they will form the basis of the appellant's case at any subsequent local inquiry, though other grounds will not be excluded at the inquiry by their omission from the form. It should also be borne in mind that a copy of the form, including the grounds of appeal, will be sent by the Ministry to the local planning authority in advance of the inquiry.

With the form of appeal in duplicate there must be transmitted to the Ministry one copy of each of the following:—

(*a*) the application for planning permission;

(*b*) all relevant plans, drawings and particulars submitted to the local planning authority;

(*c*) the notice of the authority's decision, if any; and

(*d*) all other relevant correspondence with the authority.

Where the appeal is against a refusal of permission, and an application for determination of development charge has been made to the Central Land Board, an additional copy of items (*a*) and (*b*) and the original form D1 must also be sent to the Ministry.

No fees are payable to the Ministry.

Immediately after the appeal has been made to the Ministry notice of the fact must be given to the local planning authority. There is no form prescribed and a letter simply stating that an appeal has been made will suffice.

The Minister is not required to hold a local inquiry into every appeal, though he must afford the appellant and the authority, if they respectively so desire, the opportunity of appearing before and being heard by a person appointed by him. It is, however, the Minister's usual practice to hold such a local inquiry, and the appellant may expect to receive in due course notice of the appointment of an inspector to hold the inquiry with details of the date, time and place. Anything from about three to five weeks' notice may be given. The appellant will be asked by the Ministry to affix a notice of the inquiry, supplied by the Ministry, on the land and the Ministry request the local planning authority to give notice of the inquiry to owners and occupiers of property in proximity to the appellant's land who may be considered by the authority to be affected. It may be expected, therefore, that, if the development is likely to prejudice any neighbours, they will come to the inquiry to put their point of view.

The inquiry is held in public and the Press are usually present.

The order of proceedings is shortly as follows:—

(1) The inspector opens the inquiry and takes a note of the representatives of the appellant and the authority and of their respective witnesses and then of any other persons who may be present and wish to be heard.

(2) The appellant's representative opens his case and calls his witnesses.

(3) The authority's representative opens his case and calls his witnesses.

(4) Any other persons who wish to be heard state their cases.

(5) The appellant's representative replies.

After the inquiry has been closed, the inspector views the site in the presence of representatives of the appellant and the authority. It is not necessary for the legal representatives of the parties to attend the view if there is some other person,

e.g., a surveyor, available, though it is quite in order for them to do so.

The proceedings are not of a very formal nature, it is not usual to take evidence on oath, and the rules of evidence are not strictly adhered to, but witnesses are subject to examination, cross-examination and re-examination in the usual way. It is quite usual for expert witnesses to hand a copy of their evidence to the inspector and then read it through. In this case a copy of the evidence should be available for the opposite party.

The inspectors who hold inquiries are well aware of the various points to be ascertained, and will give every assistance in elucidating the facts of the case, so that a solicitor need not be deterred from taking these appeals because he is not accustomed to them or because he does not normally engage in advocacy, though, as in everything, practice makes perfect.

The Minister's decision will be received a month or two after the inquiry in the form of a letter giving the arguments of the two parties, the considerations which have influenced him, and his decision.

Each party is usually left to bear his own costs, though the Minister has been known to order a local authority to pay a lump sum towards the appellant's costs where the decision appealed against is one which clearly should not have been made.

R. N. D. H.

SECRET PROFITS

IT is probably true to say that the majority of employed persons, though they recognise themselves as bound to allot so many hours per day to the affairs of their employers, regard their activities outside "the firm's time" as being entirely their own affair—or, at most, a matter between themselves and the tax-gatherer. To be told that in certain circumstances he could be compelled to hand over his spare-time earnings to his employer, notwithstanding that he may have made no use of any property or secret information belonging to his master would, it is thought, give pause to the average employee. The completely honest servant has, of course, nothing to fear; but more authoritative pens have written of the general decline in moral standards, so that it is unfortunately not safe to assume that the facts of *Reading* v. *R.* (1948), 92 SOL. J. 426, are unique.

The basic principle is not in doubt. Servants, like agents and trustees, belong to a class whose members must be particularly careful that their duty and their interest do not conflict. "No man should be allowed to have an interest against his duty," said Lord Ellenborough in *Thompson* v. *Havelock* (1808), 1 Camp. 527. This "is not a technical or arbitrary rule," added Lord Cairns, L.C., "it is a rule founded upon the highest and truest principles of morality" (*Parker* v. *McKenna* (1874), L.R. 10 Ch. 96).

Thus, a trustee may not take a benefit from his trust, according to the maxim best manifested in *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61, and recently applied by the Court of Appeal in *Re Knowles; Nelson* v. *Knowles* (1948), 92 SOL. J. 322. (For an interesting distinction founded on special facts, see *Re Gee; Wood* v. *Staples* (1948), 92 SOL. J. 232.) "It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection" (*per* Lindley, L.J., in *Aas* v. *Benham* [1891] 2 Ch. 244, at p. 255). Applied to the law of agency, the same principle prohibits the taking by the agent of a bribe or secret commission.

Though the foundation of the prohibition against secret profits is the necessity of guarding against a conflict of duty and interest in the agent or servant, it is generally immaterial to show that such conflict did not result in damage to the interests of the principal or master. This was specifically decided in *Parker* v. *McKenna*, but a simpler illustration than the complicated facts of that case is given by Denning, J., in *Reading* v. *R.*, when he takes the case of a master who tells his servant to exercise his horses, and while the master is away, the servant lets them out and makes a profit by so doing. Though there is no loss to the master, whose horses have been exercised, the servant must account for the profit. But the position seems to be different if it can be positively shown that no conflict of duty and interest arose in the special circumstances of the case. In *Rowland* v. *Chapman* (1901), 17 T.L.R. 669, for instance, one of a group of joint purchasers of land acted as agent for the group, and unknown to the others received from the vendor a commission on the purchase-money. It was held that, since the agent was himself interested in keeping the price down, there was no conflict and the purchasers could not rescind.

Rescission of the contract, if the person putting up the "bribe" is the other party to the contract, is only one of several remedies open to a principal whose agent has proved less than honest. The agent is liable to instant dismissal, and forfeits his right to his lawful commission, which can be recovered from him if the principal has already paid it (*Andrews* v. *Ramsay & Co.* [1903] 2 K.B. 635); though in *Hippisley* v. *Knee Bros.* [1905] 1 K.B. 1, agents who had acted without fraud or dishonesty, receiving certain trade discounts on printing and advertising bills under what they genuinely believed to be a customary term implied in the contract, were allowed to retain their proper commission notwithstanding that the court construed the contract differently and ordered payment over to the principals of the discounts. A gratuitous agent is probably in no better position so far as the retention of discounts is concerned (*Turnbull* v. *Garden* (1869), 20 L.T. 218, where, however, the invoices submitted by the agent were found to be "salted").

Again, besides recovering the secret profit from the agent, a principal may sue the third party for it, if the third party has acted fraudulently. The Court of Appeal in *Mayor of Salford* v. *Lever* [1891] 1 Q.B. 168, laid it down that as the action against the third party lay in damages for a fraudulent conspiracy with the agent and the agent had also been guilty of a separate fraud in his character of agent, the principal was entitled to damages from the third party even though he had already recovered the bribe from the agent, and that the damages could not be diminished by the latter circumstance. This case was apparently not cited to Bruce, J., when, in *Cohen* v. *Kuschke & Co.* (1900), 83 L.T. 102, he said, "The plaintiff cannot, of course, recover the money twice over." The courts are stronger in their stern discouragement of bribery than his lordship appeared to think. The measure of damages is at least the amount of the secret profit, at any rate in the case of a sale by the defendant to the plaintiff through the latter's agent, for the vendor must be assumed to have been willing to sell at the actual sale price less the commission he paid to the agent (*Hovenden and Sons* v. *Millhoff* (1900), 83 L.T. 41).

Both the giver of a bribe and an agent or servant who accepts it may be liable to prosecution under the Prevention of Corruption Acts, 1906 and 1916.

The case of *Lister & Co.* v. *Stubbs* (1890), 45 Ch. D. 1, threw up an interesting point with regard to the nature of the principal's action for recovery of the secret profit from the agent. An agent had invested money received by way of secret commission, and the principals claimed to follow the money and to restrain the agent from dealing with the investment on the footing that it was a trust fund. Lindley, L.J., confessed that he was startled by the consequences which such a proposition would involve. The true relation between the parties in these circumstances was held to be that of debtor and creditor, not trustee and *cestui que trust*. It seems, then, that the principal's right of action against the agent is properly to be regarded as founded in quasi-contract for money had and received to the principal's use.

Indeed it may respectfully be questioned whether Denning, J., does not put the matter on too broad

a basis in stating in *Reading's* case, " At law the action took the form of money had and received. In equity it was put on the basis of a constructive trust due to a fiduciary relationship. Nowadays it is unnecessary to draw a distinction between law and equity. The real cause of action is a claim for restitution of moneys which, in justice, ought to be paid over." If a legitimate implication here is that the equitable remedy of injunction to restrain the disposal of such investments as were in question in *Lister & Co.* v. *Stubbs* could now, in the discretion of the court, be granted, then that implication appears directly contrary to the authority of the Court of Appeal.

In another respect *Reading* v. *R.* may be regarded as breaking new ground. The facts were that the suppliant, a British army sergeant stationed in Cairo, was found to be in possession of considerable sums of money in his flat and at banks in Egypt. He accounted for his acquisition of these moneys in a statement which told how he had, in full uniform, escorted loaded lorries through Cairo so that they were able to pass the civilian police without inspection. A civilian subsequently handed to the suppliant envelopes which he later found contained large sums of money. The money was seized by the military authorities, and the suppliant presented a petition of right praying for its return to him. The connection here between the profit and the servant's or agent's position *vis-à-vis* the principal is different from that in previous cases. In *A.-G.* v. *Goddard* (1928), 98 L.J.K.B. 743, the secret profits were bribes received by a police sergeant in the course of making confidential inquiries with regard to night club premises as part of his duty, and the decision proceeded on that ground. Indeed, the Court of Appeal in *Aas* v. *Benham, supra*, admittedly a case between partners, had held the defendant not liable to account for the profits of a business carried on by him which was outside the scope of the partnership business and which did not compete with it, although information acquired in the course of the partnership business had been used. It was not, of course, information to which the partnership could lay any exclusive claim.

Denning, J., points out that in *Reading's* case there was not a fiduciary relationship, nor was the suppliant acting in the course of his employment. In his lordship's opinion, however, these are not essential ingredients of the cause of action. " In my judgment, it is a principle of law that, if a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, then he is accountable for it to his master." As examples of cases where the service merely gives the opportunity for making money, his lordship instances a case of gambling during the master's time, or that of a soldier engaging contrary to King's Regulations in trade having the opportunity to do so from the fact of his being stationed in a certain place. " The mere fact that the service gave the opportunity for getting money would not entitle the Crown to it, but if, as here, the wearing of the King's uniform and his position as a soldier is the sole cause of his getting the money ***and he gets it dishonestly***, that is an advantage which he is not allowed to keep."

We have ventured in this last extract to italicise a phrase which it is submitted sufficiently distinguishes *Aas* v. *Benham* and at the same time emphasises the moral basis of the rule against secret profits. Honesty is indeed not only the best but the only lawful policy.

J. F. J.

A Conveyancer's Diary

AUTHORITY OF ESTATE AGENTS TO CONCLUDE CONTRACTS OF SALE

THE question whether an estate agent who is instructed to sell real property has authority to enter into a binding contract of sale on behalf of his principal, and, if so, what sort of contract he may be authorised to make, was discussed in the recent case of *Wragg* v. *Lovett*, a short report of which appears at [1948] W.N. 455. Strenuous efforts were made to persuade the Court of Appeal to define with some precision the exact scope of an estate agent's authority in this respect, but these efforts were unsuccessful. However, although the court found a way round the admittedly difficult legal problem before it by deciding the issue on the facts, certain observations fell from the court which will be of assistance in deciding, and advising on, similar questions in the future.

The facts in this case were complicated by a side issue which has no immediate relevance to the question under discussion, but which calls for a fuller statement than is contained in the report. W was the tenant of a house belonging to L which was managed on his behalf by a firm of estate agents, W & Co. The tenancy was protected by the Rent Acts. While he was still a tenant W wrote to W & Co., asking whether L would be prepared to sell him the freehold. At this point there ensued a series of somewhat confused events, which led to much conflicting evidence at the trial, largely because L, owing to old age and deafness, conducted his negotiations with W & Co. concerning the proposed sale through his daughter.

The result of these negotiations between principal and agent was, as was found at the trial, that L authorised W & Co. to sell the house to W for £840 on the condition that W intended to remain in the house. The purpose of this condition was clear: with W in the house as a tenant entitled to the protection of the Rent Acts the freehold had only a limited market value, and L wished to guard against the event of W obtaining the freehold reversion at a comparatively low price and reselling after a short time with vacant possession at a greatly enhanced price. W was prepared to purchase on these terms, and informed W & Co. that it was his intention to remain in the house. W & Co. thereupon prepared a memorandum of agreement, expressed to be made between L and W, whereby L agreed to sell and W agreed to purchase the house at the price of £840, and signed the memorandum as agents of L. The agreement was made subject to the National Conditions of Sale, so far as applicable to a sale by private treaty, and subject also to special conditions on the following matters: (1) deposit, (2) date for completion, (3) vendor's title to sell, and (4) root of title. It was not contested that as a result of the existence of these special conditions the contract was not an open contract.

The house was in Norwich, and at the date of this contract W was working in London. Shortly after the date of the contract W received orders from his employers (as his evidence, which was accepted at the trial, showed) to start work at an establishment in the north country. Without informing L and before a conveyance had been executed, W instructed auctioneers to sell the house, and the house was in fact resold with vacant possession just over a month after the original contract for £1,350. L thereupon refused to complete and W brought an action for specific performance. The defence was two-fold. Firstly, L alleged that the contract had been induced by W's representation that he intended to remain in the house. Jenkins, J., found as a fact that when W made that representation it was true, since it was only after the representation had been made that W received the orders to move from his employers which caused him to change his mind, and the fact that W remained in occupation for only a short time was immaterial. This indicates the futility of trying to control the future actions of a tenant-purchaser by some loose form of condition.

The stage was thus cleared for argument on the second and main point which L raised in defence, which was a denial that W & Co. had authority to enter into a binding contract on behalf of L, or alternatively authority to enter into the particular contract which W & Co. did in fact sign as his agents. Jenkins, J., held that an authority to sell had been given; and further that as the contract in question was on the whole more beneficial to the vendor, L, than an open contract would have been, there was nothing in the decision in *Keen* v. *Mear* [1920] 2 Ch. 574 to prevent him from holding that an authority given to an estate agent to sell (which on the earlier decision would carry with it an authority for the estate agent to enter into an open contract binding on the vendor) did not confer upon the agent an authority to enter into a contract more beneficial to the vendor than an open contract. Specific performance was accordingly decreed.

The Court of Appeal did not deal with the first defence of misrepresentation, and indeed refused to admit further evidence (which, it was alleged, had come to light since the trial) purporting to indicate that the purchaser knew at the date of the contract that his employers were about to move him, and so could not honestly have then intended to remain in the house. On the other defence the Court of Appeal held that the proper inference from all the facts was that the vendor, L, had authorised his agents to make whatever contract they thought best on his behalf, and on this finding it became unnecessary to decide the broader question (which Jenkins, J., had decided in the purchaser's favour) whether an estate agent, given instructions to sell, has authority to enter into any contract other than an open contract on behalf of his principal.

On the general question of an estate agent's authority, Russell, J. (as he then was), in *Keen* v. *Mear*, *supra*, had laid it down (at p. 579) that "the mere employment . . . of an estate agent to dispose of a house confers no authority to make a contract; the estate agent is solely employed to find persons to negotiate with the owner; but if the agent is definitely instructed to sell at a defined price, those instructions involve authority to make a binding contract and to sign an agreement." In that case the contract signed by the agent was an open contract, and this was held to be binding on the principal who instructed the agent (there were other factors in that case which are irrelevant here). The Court of Appeal in *Wragg* v. *Lovett*, *supra*, considered this statement of the law, and without deciding the matter observed that the authorisation which Russell, J., had in mind appeared to be limited to an authorisation to enter into an open contract. It was also pointed out that whereas an open contract is something which is certain, the question whether some other contract may be more beneficial to a vendor than an open contract could not be solved except by litigation.

The upshot is that as the Court of Appeal decided this case on its facts, Jenkins, J.'s decision that an estate agent authorised to sell is authorised to enter into a contract more beneficial to the vendor than an open contract can be regarded as no more than *dictum*, and, moreover, is a decision unlikely to find favour in any case where the point arises for direct decision in view of the observations passed upon its possible inconveniences by the Court of Appeal. This decision is, of course, only in point where the authority is a definite authority to sell, and does not affect the general rule (restated in the passage quoted above from *Keen* v. *Mear*) that an authority given to an estate agent to do less than sell (e.g., to "dispose of") carries with it no authority to enter into a contract of sale at all.

"A B C"

Landlord and Tenant Notebook

CONTROL AND JURISDICTION

THE county court decision in *Tamlin* v. *Hannaford* referred to in the "Notebook" of 6th November (92 SOL. J. 631), in which it was held that premises vested in the British Transport Commission by the Transport Act, 1947, were decontrolled so that sub-tenants occupying parts of such premises have been deprived of protection, is, the Minister of Health understands (see his answer to a question in the House, reported in 92 SOL. J. 649), to be the subject of an appeal. But, as mentioned in my article, the Commission, as soon as the reserved judgment had been delivered, issued an announcement (*a*) pointing out that they were not parties to the action, and (*b*) stating that they had not pleaded that they were entitled to Crown privilege in relation to their property.

Whatever may be the result of any appeal in this case, the second part of the announcement, if it is to be read as a determination to renounce rights, is, strictly speaking, based on a misunderstanding of the nature of rent restriction legislation, and one which might well have provided material for the late Sir William Gilbert's quizzical humour.

For the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, operate whether pleaded or not. Under r. 18 of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920 (made applicable to proceedings under later Acts, including the Rent and Mortgage Interest Restrictions Act, 1939, by r. 1 of the Rent (Restrictions) Rules, 1939), it is the duty of the judge when proceedings are taken for the recovery of rent, possession, etc., of premises within the Acts to satisfy himself, before making an order, that the order may properly be made, regard being had to the provisions of the Acts. Those provisions themselves operate on the jurisdiction: the amount of excess over permitted amount of rent is irrecoverable (Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1); no order for the recovery of possession shall be made unless the court has power to make it under the scheduled provisions, or is satisfied about suitable alternative accommodation being available (Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, ss. 1, 3).

Various consequences have followed. In the comparatively early days, *King* v. *York* [1919] W.N. 59, showed that a new tenant, whatever he might have agreed to pay, was entitled to the benefit of the provisions restricting rent; the decision was applied in *Carter* v. *S. U. Carburetter Co.* [1942] 2 K.B. 288 (C.A.): "the language of s. 1 says that the increased rent over and above the standard rent shall be irrecoverable from the tenant . . . The sole question is whether s. 1 operates to strike out the contractual figure of rent in the lease and substitute the standard rent" (Lord Greene, M.R.). Words to the same effect appeared in the learned Master of the Rolls' judgment in *Griffiths* v. *Davies* [1943] K.B. 618 (C.A.) the following year (a tenant had made no objection that the rent was excessive when sued for possession on the ground of arrears, but later on took out a summons to determine standard and lawful rent): "s. 1 of the Act of 1920 is a statutory direction to the court to abstain from giving a judgment for recovery of rent which is shown to the court to be excessive . . . A statutory prohibition or direction cannot be overridden or defeated by a previous judgment between the parties."

As regards possession, a series of decisions beginning with that of Astbury, J., in *Artizans, Labourers and General Dwellings Co.* v. *Whitaker* [1919] 2 K.B. 301 (under the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915) illustrate the position. In that case it was pointed out that a tenant who gave notice was not thereby disentitled to protection (though it seemed "whimsical" to the learned judge that an Act passed for the relief of tenants should apply when the tenant had himself put an end to the tenancy). In *Remon* v. *City of London Real Property Co.* [1921] 1 K.B. 49 (C.A.), the 1920 Act having "made some

progress in the development of this new statutory tenancy," the prohibition was emphasised by Scrutton, L.J.; but perhaps the clearest exposition is to be found in the judgment of Bankes, L.J., in *Barton* v. *Fincham* [1921] 2 K.B. 291 (C.A.) (here the tenant agreed to surrender, was paid £20 as consideration, but changed her mind): " It appears to me that the Legislature in reference to claims for possession has secured its object by placing the fetter, not upon the landlord's action, but upon the action of the court . . . The Legislature has definitely declared that the court shall exercise its jurisdiction only in the instances specified . . ."

Other consequences have been the oft-illustrated right to take a point on appeal which was not taken in the court below: in *Salter* v. *Lask* [1924] 1 K.B. 754 (C.A.) it was held that the relevant section did not provide a statutory defence, and a tenant who had never mentioned the Acts at first instance could claim protection on appeal; also, the rule that what matters is the position at the date of the hearing, not that at the date of expiration of contractual tenancy or issue of plaint: *Benninga (Mitcham), Ltd.* v. *Bijstra* [1946] K.B. 58 (C.A.) (house required for employee), *Bumstead* v. *Wood* (1946), 175 L.T. 149 (C.A.) (greater hardship).

In view of this, while, presumably, a racehorse may carry more weight than the minimum prescribed by those concerned with handicapping such animals, and a boxer may fight with one hand tied behind his back if he so desires, it is difficult to see how any landlord can ask a court to deal with a case on the footing that a statute which does not affect a tenancy does apply to it. For jurisdiction can neither be ousted nor conferred by agreement between litigants. A railway executive may try to provide itself with a suitable fetter; but it cannot place one upon the court. If nationalised undertakings do find that they are agents of the Crown, as the recent county court case decided, and wish to make it impossible to derive any advantage from the consequent exemption, perhaps the only way in which they could achieve their object would be to determine all tenancies of dwelling-houses vested in them, by notice or by surrender, and re-let by agreements expressly providing that the tenants shall have such rights as they would have if the properties were controlled. If there is a difficulty about the habendum, which must be for a definite term, reference may aptly be made to that part of Rowlatt, J.'s judgment in *Great Northern Rly. Co.* v. *Arnold* (1916), 33 T.L.R. 114, which envisaged the grant of a 999-year lease with an option to determine. R. B.

ROMANCE AND REALISM

Dr. Samuel Johnson once described a second marriage as " the triumph of hope over experience." A glance at the Civil Judicial Statistics for the calendar year 1947, recently summarised by the Lord Chancellor's Department, may tempt the thoughtful reader to apply the aphorism to the institution of marriage itself.

The number of matrimonial petitions filed during the year was 48,772; the total of matrimonial causes tried, in the Divorce Division in London and by commissioners outside London, was 54,635. Decrees *nisi* for dissolution of marriage totalled 52,249, husbands' petitions being 34,000, and wives' petitions 18,249. These statistics take no account of matrimonial proceedings in magistrates' courts, of separations effected by deed or oral arrangement, or of those brought about by the withdrawal of husband or wife from the matrimonial home without acquiescence by the other party but without the institution of legal proceedings.

The annual number of marriages is approximately 300,000. It is interesting to observe, in the High Court statistics, that the proportion of " guilty " wives to " guilty " husbands is very nearly two to one. This is perhaps the most significant symptom of the social revolution that has taken place in this country since the first world war.

It is a sobering and arresting thought that each of the partners, in every one of these fifty thousand or so marriages which have thus come to an untimely end, was on the wedding day prepared to enter into a " voluntary union of one man and one woman for life, to the exclusion of all others " (*Hyde* v. *Hyde* (1888), 13 P.D. 166). *Tout passe, tout lasse*: what stronger evidence could be produced of the mutability of human wishes, the transitoriness of human happiness? We have travelled far in time and thought from the days when there was a romantic ending to all love stories—" So they were married and lived happily ever after." Shakespeare's noble sonnet, beginning—

> " Let me not to the marriage of true minds
> Admit impediments. Love is not love
> Which alters when it alteration finds,
> Or bends with the remover to remove "

is to-day echoed in the celluloid products of Hollywood—inflammable and ephemeral—but seldom in real life.

This romantic conception of married bliss, which began to blossom in the Middle Ages, reached its fullest bloom during the Renaissance period, and in England found expression through the Elizabethan poets and dramatists, the successors of the great Italian writers, particularly Dante Alighieri. In Boccacio the bloom is surrounded by the thorns of cynicism, but the flower itself has not wilted. The romantic attitude was something new in literature—something quite foreign to the classical tradition on which the Renaissance was in other respects based. With the exception of Theocritus and the poets of the Anthology, the great writers of Ancient Greece approached the subject in a colder, more realistic, vein. The words put by Thucydides, in the Second Book of his History, into the mouth of the great Athenian statesman, Pericles, express the classical Greek ideal—" that our women should see to it that they are as little talked of as possible, whether for good or ill."

Republican and Imperial Rome assigned to women a more active and independent role, but sexual morals (at any rate under the Empire) were coarse and degraded. The Roman attitude rather than the Greek is manifest among the writers of the Restoration period in England, who reacted strongly against both the romantic Elizabethan ideal and the Puritanical treatment of the subject under the Commonwealth.

With the opening of the eighteenth century there is a further change: the coarseness of Congreve gives way to the playful cynicism of Sheridan. In France, Italy and Austria the same tendency appears. The looseness of the marriage tie, the promiscuity of man and the seductibility of woman, are treated with a wit and levity as refreshing to the realist as they are shocking to the moralist. The French dramatist, Beaumarchais, shows us in *Le Mariage de Figaro* the disillusionment, after ten years of married life, of the Count and Countess Almaviva, who had figured as young and romantic lovers in his earlier play, *Le Barbier de Séville*. *Figaro* itself, with its ridicule of the romantic conception of love and marriage, and its sly digs at aristocratic privilege, was symptomatic of the revolt against political and ecclesiastical authoritarianism which culminated in the French Revolution of 1789. It was only three years before that event that the brilliant adaptation of the play by the librettist Lorenzo da Ponte, set to the sparkling music of the immortal Mozart, created in Vienna a sensation that echoed throughout Europe. Mozart and da Ponte collaborated again in *Don Giovanni*, performed the following year in Prague, and in *Così fan tutte*, performed there in 1790. This great trilogy, more perhaps than any other artistic works of the time, gave the *coup de grâce* to the old-fashioned romanticism. The wicked seducer, Don Juan, brave, gay and handsome, has all the composer's sympathy; the chaste Donna Anna is represented as prudish and frigid; the faithful lover, Don Ottavio, can only be described, in the modern idiom, as " stuffy." *Così fan tutte*, as the title implies, sets out to prove, and succeeds in showing, that the best of women is a light of love.

The new romantic movement of the 1830's is but a poor, distorted image of the old. Sentiment has turned to sentimentality; sweetness has become cloying. The penny novelette, the Hollywood film and the crooner are its heirs. To some it may appear that a slight admixture of eighteenth-century scepticism in pre-marital relationships, and of Renaissance idealism in the wedded state, would go far towards arresting the present trend of demoralisation. A. L. P.

A conference to discuss the Establishments Work of Local Authorities is being arranged by the Institute of Public Administration and will be held at the Central Hall in London, on 28th and 29th April, 1949.

Notes from the County Courts

LETTINGS IN CONSEQUENCE OF EMPLOYMENT

SOME recent cases decided by His Honour Judge R. A. Willes in the County Courts of Derbyshire call attention to the difficult and, as it may be thought, unsatisfactory state of the law regulating the relationship of landlord and tenant in reference to rent-restricted property when it coincides with the relationship of employer and employee.

A landlord seeking to eject a statutory tenant under the provisions of para. (*g*) of Sched. I to the Act of 1933 requires for success to establish affirmative answers to the following five questions posed by Morton, L.J., in his lucid analysis of the problem in *Benninga (Mitcham), Ltd.* v. *Bijstra* [1946] K.B. 58.

> " (i) Is it reasonable to make an order for possession; (ii) is this house reasonably required by the plaintiff for occupation as a residence for some person engaged in his whole-time employment; (iii) was the defendant in the employment of the plaintiff; (iv) was the house let to the defendant in consequence of that employment; (v) has the defendant ceased to be in that employment ? "

It is the fourth question which causes the difficulties. Two points are now settled law. First, the " letting " in reference to which this question must be answered is the tenancy terminated by the notice to quit upon which the possession proceedings are founded (*Read* v. *Gordon* [1941] 1 K.B. 495). Secondly, a house is let " in consequence of that employment " if the landlord's reason for granting the tenancy was that the tenant was his employee. In so far as earlier authorities require something in the nature of a contractual consensus to a tenancy contingent on the continued employment of the tenant, or a common motive on both sides, or even mere knowledge by the tenant of the motive of the lessor, they are overruled (*Braithwaite & Co., Ltd.* v. *Elliot* [1947] K.B. 177). But on a third point the authorities are not very helpful. In many cases which come before the courts the tenant has continued in occupation of the premises for a greater or lesser period after the cessation of his employment and before the landlord has taken any steps to recover possession. The crucial question in such cases is whether any new tenancy has been impliedly created, or whether the original tenancy has persisted. This may seem in essence to be a common law question, but the whole structure of the rent restriction legislation tends to introduce into the landlord and tenant relationship such artificialities that the unqualified application of common law principles leads to strained results. The circumstances in which the question may arise for decision are capable of such infinite variation that it would perhaps be impossible to devise any short and practical test to guide the courts who have to answer it. But one may venture to predict that the Court of Appeal will sooner or later (in the absence of fresh legislation) have to apply themselves to the task of elucidating their own earlier decisions bearing on this point.

The short facts of *Royal Crown Derby Porcelain Co., Ltd.* v. *Russell* (Derby County Court, 27th October, 1948), were these. The defendant was first employed by the plaintiffs in 1926. In 1940, at the defendant's request, the plaintiffs let him one of their own houses at 11s. 4d. a week. In April, 1941, he left the plaintiffs' employ to go to other work of greater national importance. In November, 1941, he was called up and remained in the army until April, 1946, when he applied for and was granted reinstatement in his employment with the plaintiffs. In May, 1948, the defendant left the plaintiffs' employment, whereupon the plaintiffs served notice to quit the premises of which they now claimed possession. Throughout the defendant's occupation a single rent book was used and his wife continued to live in the house during the defendant's war absence.

In a considered judgment His Honour expressed his conclusions as follows:

> " Was the house, when originally let, let to Russell in consequence of his employment ? On this question there was no evidence of express agreement, nor was there evidence of what Russell thought as to whether his being in the company's service and having been in that service for fourteen years was the reason why the plaintiffs let him the house. In view of *Braithwaite's* case there could be no such evidence, had it been tendered it would have been irrelevant. There was certainly no evidence that Russell agreed that his being in the service of the plaintiff company was, or should be treated as, the basis of the contract of tenancy under which he became the tenant of this house in 1940.
>
> I was bound to hold and I did hold that the original letting of this house was a letting by the company to Russell in consequence of his employment. It was strongly urged by Mr. Handforth in the course of his very able argument that I ought to hold that the original letting was terminated when Russell left the company's service and a new contract of tenancy was made which was not a letting in consequence of Russell's employment which had then ceased. That such events could happen no one would deny. They could not happen by accident. They could only happen as the result of agreement express or implied. There was no suggestion of express agreement. There was, in my view, no justification, on the facts proved, for implying such agreement. I was therefore, being bound by *Braithwaite's* case, compelled to give judgment for the plaintiff company who proved that they reasonably and indeed urgently required the dwelling-house for another skilled worker in their whole-time employment."

In discussing the principles involved the learned judge incorporates by reference his own considered judgment in an earlier case, in which he had clearly expressed his dissatisfaction with the consequences flowing from *Braithwaite* v. *Elliot*:

> " It is true that in the Court of Appeal in *Braithwaite* v. *Elliot* their lordships seemed to think that they were merely following an earlier decision in 1946, *Benninga (Mitcham), Ltd.* v. *Bijstra* [1946] K.B. 58, which, being inconsistent with, impliedly overruled, earlier decisions which had not been cited and which *Braithwaite* v. *Elliot* now expressly overrules. What is, to my mind, far more important than the reversal of previous decisions long accepted and followed in the county courts, is the consequences to persons in a comparatively humble position of the application of the construction now adopted by the courts. It may well be that working-class people neither know nor try to find out what their legal position will be if they leave a dwelling-house in which they enjoy the statutory protection of the Rent Acts because their landlord is not their employer, and go into residence in their employer's dwelling-house after they have entered that employer's service and when a dwelling-house belonging to that employer happens to be vacant and at his disposal.
>
> Before the decisions above referred to, and, as I think, until the decision in *Braithwaite* v. *Elliot*, if a workman having a secure dwelling and seeking or invited to move into a dwelling-house belonging to his master, had tried to find out his legal position he would have seen that under para. (*g*) (i) of Sched. I, if the dwelling-house he asked for, or which was offered to him, was 'let to him in consequence of his employment', he might lose that dwelling and his statutory protection. But, at any rate, he would have known that this dangerous consequence could not happen to him unless it could be proved that when he took the employer's cottage he knew what he was doing and the risk he ran and with that knowledge had agreed to take that risk. That view of the position was the result of the judicial guidance which the courts had given and which the Court of Appeal has now overruled."

In *Staveley Coal & Iron Co., Ltd.* v. *White* (Chesterfield County Court) the additional complications affecting a similar problem were considerable. The defendant, a collier, became, in 1927, weekly tenant of a house belonging to the plaintiffs, his employers, on the express condition (set out in a document signed by the defendant) that the tenancy should be determined by the tenant ceasing to be in the company's employ whether notice were given or not. The rent of 15s. 2d. a week was deducted from the defendant's wages by the plaintiffs under the signed authority of the defendant necessary under the Truck Acts to legalise such a deduction. On the 1st January, 1947, that part of the plaintiffs' undertaking in which the defendant was employed vested in the National Coal Board. Automatically the defendant ceased to be in the employ of the plaintiffs and became an employee of the National Coal Board. Ownership of the house occupied by the defendant was not, however, one of the assets to be nationalised, and remained vested in the plaintiffs. The defendant remained in occupation and the National Coal Board now deducted 15s. 2d. weekly from his wages and paid this over to his former employers, the plaintiffs. A signed authority for deduction in favour of the plaintiffs had been overstamped with the words " National Coal Board." In May, 1948, the defendant left his work with the National Coal Board. Thereafter he made certain payments of

rent directly to the plaintiffs, until notice to quit was served in July.

In a closely reasoned judgment His Honour concluded: first, that the original letting in 1927 was in consequence of the defendant's employment by the plaintiffs; secondly, that the tenancy so created was automatically terminated on the 1st January, 1947, by the operation of the express condition referred to. "If," the learned judge continued, "when the letting in consequence of his employment came to an end White became tenant to the Staveley Coal and Iron Co. he must have done so under a new contract of tenancy (*Tayleur* v. *Wildin* (1868), L.R. 3 Ex. 303)." But he rejected the suggestion that the arrangement whereby the defendant's rent was deducted from his wages by the National Coal Board and paid by them to the plaintiffs was the mere intervention of an agent. Pointing out that the Truck Acts require that deductions from an employee's wages in favour of third parties should be expressly authorised, as such, by the employee, he said: "The only way in which what actually took place in the present case can be reconciled with the provisions of the Truck Acts is to hold that the National Coal Board became tenants of White's house to the Staveley Coal and Iron Co. and re-let it to their servant, White, at the same rent, taking his authority to deduct the rent due from him to them before paying him his weekly wage." If the subsequent direct payments to the plaintiffs were evidence either of a new tenancy or of recognition of an existing one, this could not in any event be a continuance of the original "letting in consequence of employment." An order for possession was therefore refused.

It is submitted, with great respect, that the true effect in law of the complex facts of this case is very much simpler than the learned judge supposed. When the original contractual tenancy was determined by the operation of the express condition, the defendant's continued occupation and payment of rent did not necessarily create any new *contractual* tenancy either with the plaintiffs or with the National Coal Board (*Morrison* v. *Jacobs* [1945] K.B. 577). The defendant, it is submitted, then became statutory tenant to the plaintiffs, paying his rent through the agency of the National Coal Board. The fact that this conclusion necessarily involves the conclusion that the National Coal Board, in acting as they did, were offending under the Truck Acts would seem to be irrelevant. If the defendant's tenancy was already statutory the notice to quit was otiose and, applying the principle of *Read* v. *Gordon*, the contractual tenancy which came to an end in 1947 was the "letting" which it was material for the court to consider.

N.C.B.

NOTES OF CASES

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

LIBEL: PRIVILEGE: REPORT OF INQUIRY

Perera *v.* Peiris and Another

Lord Uthwatt, Lord Morton of Henryton, Lord MacDermott and Sir John Beaumont. 13th October, 1948

Appeal from the Supreme Court of Ceylon.

The defendants were the printers, publishers and proprietors of the *Ceylon Daily News*. The plaintiff was a doctor and a distiller of arrack (a spirit). In May, 1943, the defendants published in their newspaper extracts from the official report of the Bribery Commission, appointed by the Governor of Ceylon in 1941 to inquire into allegations that bribes had been paid to certain members of the then existing State Council of Ceylon. The report of the Commission was issued by the Government of Ceylon as a Sessional Paper and was on sale to the public. Copies of it were sent free of charge to all newspapers in Ceylon. The *Ceylon Daily News* published, without comment, and, as found by the courts in Ceylon, without malice expressed or implied, extracts from the report, including the following: "Dr. M. G. Perera who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did." The "transaction" there referred to concerned an allegation that certain members of the State Council had received from contractors to the Government for the supply of arrack a bribe in connection with negotiations for the extension of their contracts. The Supreme Court affirmed the dismissal by the District Court of Colombo of the plaintiff's action for defamatory libel in respect of the publication of that extract. (*Cur. adv. vult.*)

LORD UTHWATT, giving the judgment of the Board, said that fair comment did not arise for consideration because the Board would assume that the statement as to the plaintiff's conduct as a witness was not in accordance with fact. The only question, therefore, was whether the publication was made on a privileged occasion, for it was conceded that there was no express malice. The Board would base its decision on the wide general principle which underlay the defence of privilege rather than inquire whether this Commission's proceedings belonged to the category of Parliamentary or judicial or quasi-judicial proceedings to the fair report of which privilege attached. In *Macintosh* v. *Dun* [1908] A.C. 390, the Board had stated the wide general principle to be "the common convenience or welfare of society" or "the general interest of society." The status of a particular body whose proceedings were being reported was not conclusive (unless judicial or Parliamentary proceedings were concerned): it was necessary to consider the subject-matter of the particular report. The public interest of Ceylon here had demanded that the report should be widely communicated to the public. Privilege, therefore, attached to the defendants' publication.

Appeal dismissed.

APPEARANCES: *Slade*, K.C., and *Stephen Chapman* (*Burchells*); *Pritt*, K.C., *Sir Valentine Holmes*, K.C., *Handoo* and *Wickramasinha* (*Darley, Cumberland & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL

DIVORCE: *RES JUDICATA*

Winnan v. Winnan

Lord Morton of Henryton, Bucknill and Asquith, L.JJ.

29th October, 1948

Appeal from Cassels, J.

By October, 1942, the respondent husband was in bad health owing to his wife's, the appellant's, cruelty in making false accusations against him. He was then given work by a national service officer away from the place of the matrimonial home. In April, 1944, the husband visited his wife and found that she was keeping twenty-five to thirty cats, which were rendering the small house offensive. The husband asked her to get rid of the cats and set up house with him again. She refused, saying that she preferred her cats. During the occasional visits which the husband had paid his wife from 1942 to 1944 marital intercourse took place. The husband never returned home after April, 1944. In May, 1945, on the wife's complaint, justices made a maintenance order against the husband though he defended the proceedings. The wife now appealed from an order of Cassels, J., granting the husband a decree *nisi* on the ground of her cruelty and desertion. (*Cur. adv. vult.*)

BUCKNILL, L.J.—LORD MORTON and ASQUITH, L.J., agreeing—said that, although the previous cruelty had been condoned through marital intercourse from 1942 to 1944, the wife's later insistence on maintaining the intolerable presence of a quantity of cats in the house amounted to constructive desertion. Such desertion, not less than actual desertion, could operate to revive the condoned cruelty. It was argued that the proceedings before the justices estopped the husband from petitioning the court for divorce. A husband could not be guilty of wilful neglect to maintain a wife who was in desertion. Her desertion, therefore, was a defence to her complaint to the justices. Accordingly, the justices must be taken to have considered that matter of defence and, by making a maintenance order, to have rejected it. That was so no less of constructive than of actual desertion. That implied decision of the justices, however, did not estop the husband from subsequently petitioning for a decree of divorce on the ground of desertion. The issue of desertion impliedly considered by the justices and that raised by the petition did not form the "same subject of litigation" within the definition of *res judicata* given by Wigram, V.-C., in *Henderson* v. *Henderson* (1843), 3 Hare 100, and that was so equally whether a spouse had been found guilty or innocent of a matrimonial offence in the earlier proceedings. The fact that a petitioner for divorce referred in the petition to previous proceedings before justices between the parties did not by necessary inference raise the issue of *res judicata*. Accordingly, if a respondent wished to raise that issue it must be pleaded expressly in his or her answer. Appeal dismissed.

APPEARANCES: *M. P. Picard* (*L. H. Whitlamsmith, The Law Society*); *E. A. Jessel* (*Bunker & Son*, Hove).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

WILL: CONTINGENCY NOT EXACTLY PROVIDED FOR: IMPLICATION

***In re* Bowen; Treasury Solicitor *v.* Bowen**

Wynn Parry, J. 27th October, 1948

Further consideration.

The testator, David Bowen, who died on 18th March, 1941, by his will made in 1931 gave a life interest in his real and personal estate upon trust for his mother, who was his only next of kin, for her life, and after her death for his uncle, Evan Bowen, but in the event of Evan Bowen dying in his mother's lifetime he gave his estate (charged with the payment of certain legacies) to the children of the said Evan Bowen in equal shares as tenants in common. An action was brought to administer the testator's estate, and the usual order having been made, the master certified that Evan Bowen had predeceased the testator, leaving children, but the testator's mother had predeceased David Bowen. The case now came on for further consideration, when the Crown contended that the gift over did not take effect, and that there was an intestacy. The Treasury Solicitor claimed the estate as *bona vacantia*. The defendant, one of the children of Evan Bowen, contended that the intention of the testator was to give the estate to the children of Evan Bowen, subject to his mother's life interest.

WYNN PARRY, J., said that the defendant's argument was based on the well-known case of *Jones* v. *Westcombe* (1711), Prec. Chan. 316, applied by the Court of Appeal in *In re Fox's Estate* (1937), 82 SOL. J. 74, holding that the testator must be taken by necessary implication to have made provision for the event which happened as well as for the lapse he had provided for. The principle was well stated in Theobald on Wills, 8th ed., at p. 739. The courts in applying the principle of *Jones* v. *Westcombe* had considered what was the real contingency guarded against: *Davies* v. *Davies* (1882), 47 L.T. 40, where the contingency of a wife dying within twelve months of the testator was treated as meaning not being alive at the expiration of that period, thus giving effect to the obvious intention of the testator. What was the real contingency in the present case? Apart from his mother the testator's nearest natural relatives were his uncle Evan and the latter's children, two of whom he appointed executors. He gave his estate to his uncle absolutely, but if the uncle died in his mother's lifetime, to his children. If the testator had been asked what was to happen if the uncle was alive at the death of the mother, but died in the testator's lifetime, he would have unhesitatingly replied: "Then, of course, the children are to take." The case fell within the principle of *Jones* v. *Westcombe*. The decision in *In re Graham* [1929] 2 Ch. 127, was distinguishable as the gift there was conditional.

APPEARANCES: *McMullen* (*Danckwerts* with him) (*Treasury Solicitor*); *H. E. Francis* (*T. D. Jones & Co.*, for *Jeuan J. Luke*, Newcastle Emlyn).

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

WILL: GIFT *INTER VIVOS*: RULE AGAINST DOUBLE PORTIONS

***In re* George's Will Trusts; Barclays Bank, Ltd. *v.* George**

Jenkins, J. 11th November, 1948

Adjourned summons.

The testator, a farmer, had two sons, E, who assisted him on the farm, and R, who was employed at a branch of Barclays Bank, Ltd. By his will dated 22nd July, 1940, the testator directed his trustees to hold his residuary estate in trust to pay two-thirds to E absolutely and one-third to R absolutely, but E was given the option of carrying on the testator's freehold farm, and if he exercised the option, a valuation had to be taken and R's one-third had to be charged on the farm stock or otherwise, so as to produce interest at the rate of 5 per cent. per annum. In 1941, when the testator was approximately eighty-two years old, the county war agricultural committee served notice on him to vacate his freehold farm and another farm, of which he was the tenant, because they were not efficiently managed, and on 25th August, 1941, in pursuance of a scheme vesting control of the farms in E (which scheme was approved by the committee), the testator, by deed of gift, gave the live and dead stock of both farms to E. The testator died on 4th September, 1942. The court was asked to determine whether the rule against double portions applied and whether E, when the value of his share in the residuary estate was ascertained, had to bring into account the value of the live and dead stock which formed the subject matter of the gift *inter vivos*.

JENKINS, J., said that if both the gift by will and the gift *inter vivos* were in the nature of portions, a presumption arose that the testator intended the provision *inter vivos* to be on account of the provision by will, but the presumption was rebutted if the circumstances in which the gift *inter vivos* was made made it clear that the testator did not intend the provision *inter vivos* to be on account of the provision by will (*In re Vaux* (*No.* 1) [1939] Ch. 465, 481; *In re Lacon* [1891] 2 Ch. 482). In the present case both gifts were in the nature of portions. The proposition that the rule against double portions did not prevail where the gifts were not *ejusdem generis* did not apply to cases like the present where a money value was put on the gift in kind. The fact that the war agricultural committee compelled the testator to retire from the active management of his farms afforded no ground for the testator to increase E's portion, though it did afford good ground for putting E into immediate possession of part of the testamentary portion designed for him.

APPEARANCES: *Lightman* (*Torr & Co.*, for *Barnes & Lanham*, Brackley); *J. A. Plowman*; *Ian G. H. Campbell* (*Preston, Lane-Claypon & O'Kelly* for *Walter R. G. Law & Son*, Buckingham, and *Darby & Son*, Oxford).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

PATERNITY: PERIOD OF GESTATION

***In re* B.; B. *v.* B.**

Vaisey, J. 26th November, 1948

Appeal from an order of the magistrate at the Thames Police Court.

In March, 1948, R. B. applied to the magistrate for a separation from his wife, the present respondent, on the ground of her adultery, and an order was made, and at the same time the husband was ordered to pay 12s. 6d. a week maintenance of a child of the wife, now three years old. In September the husband applied that this latter order be discharged on the ground that he was not the father of the child. The magistrate, however, on the evidence before him refused to disturb the order; and the husband appealed and adduced fresh evidence.

VAISEY, J., said the case was so far as he was aware an unprecedented one. An affidavit from the R.E. Record Office proved that the husband had been continuously overseas from October, 1943, to 29th January, 1945, when he returned home. The child was born on 8th August, 1945, and if it was the husband's child the period of gestation was only 188 days. It was true that in *Clark* v. *Clark* [1939] P. 228, the period of gestation was even less, only 174 days. But that was a case of extremely premature birth, the child was not normal. Here there was no suggestion of premature birth, and the child was perfectly normal. On this medical evidence he (his lordship) was driven to the conclusion that the child could not possibly be the offspring of the husband. The magistrate hesitated, on the evidence before him, to make an order bastardising the child, but having regard to the great doubt as to the child's parentage, he must discharge that part of the order relating to the weekly payment. There would be no order as to costs.

APPEARANCES: *K. B. Campbell* for appellant (*T. C. Halford*); respondent in person.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

DIVISIONAL COURT

FOOD AND DRUGS: PROCEDURE WITH SAMPLES

Stone & Sons (Hounslow), Ltd. *v.* Pugh

Humphreys, Lynskey and Byrne, JJ. 22nd October, 1948

Case Stated by Middlesex Justices.

The appellants, retail butchers, delivered to a hospital a quantity of sausage meat and sausages on metal trays on which neither their name nor their address appeared. Thereupon a sampling officer took samples which he divided into three parts as required by s. 70 (1). One sample was sent for analysis and proved to be deficient in meat content. The butchers were sent neither a part of the samples nor notice of intention to have the samples analysed. The sampling officer refused, under s. 70 (2), a subsequent written request by the butchers to be supplied with one part of each of the samples. The butchers contended that that refusal was in breach of the sampling officer's duty under s. 70 (1) and, further, that in compliance with their request under s. 80 (1) that the public analyst should be called as a witness, the analyst's assistants should have been called at the hearing of the summonses to give evidence of facts stated in the analyst's certificate of which he had no immediate knowledge himself. The justices convicted and fined the butchers who now appealed. By s. 70 (1) of the Food and Drugs Act, 1938, where a sample of food is taken by a sampling officer on the premises of a person who is proposing to sell the food, the seller,

or the person in charge of the premises, is to be told forthwith of the intention to have the sample analysed and, if he requires it, to be given one part of the sample: "Provided that, in relation to samples taken in such circumstances as are mentioned in" s. 70 (2) "the foregoing provisions with respect to the giving of information and the manner of dealing with samples shall have effect as modified by" s. 70 (2). Section 70 (2) concerns the taking of samples while goods are in transit or at the premises of the purchaser, consignee or consumer and provides that a person taking a sample of food in those circumstances "shall, if he intends to submit it" for analysis "deal with it" as under s. 70 (1) "except that he shall retain the first-mentioned part of the sample"—i.e., the part required by s. 70 (1) to be given on demand to the seller or person in charge of the premises—unless the name and address of the consignor appears on the container containing the article sampled in which event certain procedure is prescribed.

LYNSKEY, J.—HUMPHREYS and BYRNE, JJ., agreeing—said that the effect of the proviso to s. 70 (1) was to incorporate the provisions of s. 70 (1) into s. 70 (2) except in so far as the former concerned the giving of notice of intended analysis and the manner of treating samples. The different provisions of s. 70 (2) with regard to those two matters did not apply where the name and address of the consignor were not on the container of the goods in question. Accordingly, the right given to the consignor of goods by s. 70 (2) to have part of the sample and notice of intended analysis sent to him by registered post on demand was not given where his name or address did not appear on the container. Therefore, as neither the name nor the address of the butchers appeared on the trays containing the meat, they were, by virtue of s. 70 (2), not entitled to receive either one part of the samples or notice of intended analysis. As for the butchers' second point, the person whom a party was entitled, under s. 80 (1), to have called as a witness was "the analyst." Therefore, it was for the justices, having heard the evidence of the analyst, to say whether there was sufficient evidence before them to prove the alleged deficiency. Appeal dismissed.

APPEARANCES: *Dudley Collard* (*P. R. Kimber*); *F. H. Lawton* (*C. W. Radcliffe*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROVINCIAL LAW SOCIETIES

At the annual general meeting of the LEICESTER LAW SOCIETY, held on Thursday, the 28th October, 1948, Mr. C. E. Crane (Ashby-de-la-Zouch) and Mr. C. F. Bray (Leicester) were re-elected as President and Vice-President respectively for the ensuing year.

The following other officers were also re-elected: Mr. S. H. Partridge, Hon. Treasurer; Mr. Newton Beare, Hon. Secretary; and Mr. H. W. Skillington, Hon. Librarian.

The meeting was preceded by a luncheon attended by the officers and committee of the Society, at which Mr. W. J. Taylor (Newmarket), Mr. S. E. Wilkins (Aylesbury) and Mr. G. Corbyn Barrow (Birmingham), members of the Council of The Law Society, were guests. These gentlemen subsequently attended the annual meeting when they addressed the Society's members on the work of The Law Society, its reconstitution, and the formation throughout the country of associations of provincial law societies, the Rushcliffe Scheme and solicitors' clerks' pensions.

The YORKSHIRE LAW SOCIETY held its annual dinner at the Royal Station Hotel, York, on Wednesday, the 17th November, 1948. Mr. R. Tute Pearson of Helmsley, the President, presided.

There were over ninety members and guests present.

Among the guests were the Honourable Mr. Justice Slade, the Honourable Mr. Justice Devlin, Mr. G. W. Wrangham (Recorder of York), His Honour Judge Stewart, Col. E. Laverack (President of the Hull Incorporated Law Society), the Sheriff of York (Alderman Sanderson), Mr. A. S. Rymer (the Worshipful Governor of the Merchant Adventurers of the City of York) and Mr. S. M. B. Thompson (President of the York Institute of Bankers).

The Union Society of London, which meets in the Barristers' Refreshment Room, Lincoln's Inn, at 7.45 p.m., announces the following subjects for debate:—

Wednesday, 8th December: "That the armed forces of the Crown are maintained at too high a level."

Wednesday, 15th December (Ladies' Night Debate): "That in the opinion of this house a fruitarian diet should be adopted by the human race." This motion will be proposed by Dr. Josiah Oldfield. Ladies will be welcome visitors at this debate.

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL]

Road Charges Indemnities

Sir,—With reference to "A B C's" article on Covenants of Indemnity against Road Charges (92 SOL. J. 630), I am doubtful whether *Dyson* v. *Forster* really covers the point. The circumstances of this case can be distinguished from the usual road charge cases in two ways—

(1) The relationship in *Dyson* v. *Forster* is lessor–lessee and not vendor–purchaser. In the former privity of estate will exist after the original lessee has parted with his interest. In road charge cases there is neither privity of estate nor privity of contract as between the original covenantor and the purchaser of the land from the covenantee.

(2) In *Dyson* v. *Forster* the person seeking to enforce the original covenant is the covenantee and not a supposed assignee of the benefit of the obligation. In fact the covenant in the mining lease is more of a negative nature since no liability can arise unless or until the covenantor damages the surface of the land. The eventual making up of the road or footpath is something which both parties anticipate with reasonable certainty.

Would not the wiser course be to insist, wherever possible, on the covenant being with the purchaser and his successors, and in any event to take an express assignment in subsequent conveyances?

DENYS H. LAMBERT.

Limpsfield,
Surrey.

Our contributor writes:

I cannot agree that *Dyson* v. *Forster* [1909] A.C. 98, is distinguishable on the grounds stated by our correspondent.

(1) The covenant on which the action in this case was founded was not the covenant between the lessor and the lessee, but the lessee's separate covenant with the surface owners, who were not parties to the lease.

(2) The persons seeking to enforce the covenant were not the original covenantee (in the sense of the surface owner at the date of the lease) but his successors in title, and Lord Macnaghten expressly held at p. 102 that the covenant was one which ran with the land. This really disposes of this objection, but I also find it difficult to see how a covenant "to pay compensation for all damage occasioned by the lessee in working the mines" is negative in substance. The act of putting one's hand in one's pocket is as positive an act as I can think of.

But I certainly agree with the view that, wherever possible, these covenants should be made with the purchaser and his successors in title initially, and an assignment taken subsequently. The less doubt there is on these matters the better for all concerned.

"A B C"

Fusion of the Professions

Sir,—We have been told in plain terms that the country cannot afford to allow restrictive trade practices to continue and the docker who objects to the employment of apparatus which would reduce the number of men in his gang can justify his restrictive practice by pointing to the legal system which employs solicitor, junior counsel and senior counsel.

Is more than one of these three really necessary in many of the cases in which the trinity now appears?

Does the average undefended divorce case or plea in mitigation of sentence at quarter sessions or assize set such a problem that it is outside the experience and training of the solicitor to undertake?

In the interest of the public surely it would be an improvement if—

(1) solicitors were given the right of audience in the higher courts;

(2) barristers were allowed to take instructions direct from the lay client.

Such powers would be permissive only.

Solicitors would still brief barristers in those cases in which they did not wish to appear as advocates, and barristers might prefer not to accept direct instructions where an office organisation was needed to collect the evidence.

The public would thus have a choice and the direction in which they exercised it would show the extent to which they desired fusion.

It is for the public and not for the profession to make that decision.

A. RAWLENCE.

Croydon.

PARLIAMENTARY NEWS

HOUSE OF LORDS

Read First Time :—

NEW FOREST BILL [H.L.] [23rd November.

To make further provision as respects the New Forest in the County of Southampton.

MILK (SPECIAL DESIGNATIONS) BILL [H.L.] [23rd November.

To render compulsory the use of special designations on sales of milk by retail in specified areas, to enact certain provisions ancillary thereto as to the use of such designations, and to amend certain enactments in relation to such designations.

PRIZE BILL [H.C.] [23rd November.

RECALL OF ARMY AND AIR FORCE PENSIONERS BILL [H.C.] [23rd November.

Read Second Time :—

COAST PROTECTION BILL [H.L.] [25th November.

Read Third Time :—

COLONIAL STOCK BILL [H.C.] [25th November.

DEBTS CLEARING OFFICES BILL [H.C.] [25th November.

EXPIRING LAWS CONTINUANCE BILL [H.C.] [25th November.

HOUSE OF COMMONS

Read First Time :—

NATIONAL SERVICE (AMENDMENT) BILL [24th November.

To substitute eighteen months for twelve months as the term of whole-time service under the National Service Act, 1948, and five and a half years for seven years as the aggregate of the terms of whole-time and part-time service thereunder, and to make certain other amendments in that Act.

Read Second Time :—

CIVIL DEFENCE BILL [H.C.] [23rd November.

PENSIONS APPEAL TRIBUNALS BILL [H.C.] [26th November.

Read Third Time :—

JUDGES PENSIONS (INDIA AND BURMA) BILL [H.C.] [26th November.

QUESTIONS TO MINISTERS

UNDISCHARGED BANKRUPTS

Mr. LIPSON asked the President of the Board of Trade what is the present number of undischarged bankrupts; what check is kept on their financial activities; and whether he will consider taking action to strengthen the existing law on the matter.

Mr. H. WILSON: It is estimated that there are 60,000 undischarged bankrupts. In general no check is maintained, but if the Official Receiver obtains information suggesting that an undischarged bankrupt is committing bankruptcy offences or possesses after-acquired property, he takes whatever action is appropriate. The answer to the third part of the question is in the negative. [22nd November.

LEGITIMACY DECLARATIONS (PETITIONS)

Lieut.-Colonel LIPTON asked the Attorney-General whether he will take steps to enable petitions for declaration of legitimacy to be heard in camera.

The PARLIAMENTARY SECRETARY TO THE TREASURY (Mr. WM. WHITELEY): I have been asked to reply. Legislation would be required to give effect to the hon. and gallant member's proposal. Whether the proposal is desirable is a matter of opinion, but I will consider the matter.

Lieut.-Colonel LIPTON: Will my right hon. friend draw the attention of the Attorney-General to the remarks made by the judge in a recent case at Brentford County Court where an old lady of seventy-three had to give evidence about events of over fifty years ago, and whether it is not possible in those circumstances to allow the same privacy in legitimacy proceedings as is done in adoption proceedings?

Mr. WHITELEY: Yes, sir; that is one of the matters which the Attorney-General has in mind. [22nd November.

CENTRAL LAND BOARD (CIRCULAR)

Mr. C. S. TAYLOR asked the Chancellor of the Exchequer if his attention has been drawn to the printed circular issued by the Central Land Board entitled: "Advice on buying and selling a site for building a house"; and whether he will explain the meaning of the sentence in para. 3 which states that the amount will in any case be related to the circumstances of the owner of the land on 1st July, 1948.

Sir S. CRIPPS: The payments from the £300,000,000 are to be made in respect of interests in land, whether freehold or leasehold, existing on 1st July, 1948, which have suffered depreciation due to the Town and Country Planning Act, 1947. The Act provides that the Treasury scheme which will distribute the payments may have regard to the development value of such interests or to other circumstances affecting those interests. In either case the interest referred to is that of the person owning on 1st July, 1948. The treatment of the claim and the amount of the payment would be unaffected by any assignment to some other person of the right to receive the payment.

Mr. TAYLOR: Can I have an assurance from the right hon. and learned gentleman that the word "circumstances" in this case does not mean the financial circumstances of the owner?

Sir S. CRIPPS: It means the circumstances which rule on the date I have given, 1st July, 1948, and not the circumstances which might rule at some future date.

Mr. TAYLOR: But does it refer to the financial circumstances?

Sir S. CRIPPS: No, it refers to the factual circumstances. [23rd November.

DEVELOPMENT CHARGE (COTTAGES)

Mr. CHARLES WILLIAMS asked the Minister of Town and Country Planning if it is his practice to collect the charge when a cottage, being under the Housing (Financial and Miscellaneous Provisions) Act, 1946, is occupied by a retired agricultural worker or his widow.

The PARLIAMENTARY SECRETARY TO THE MINISTRY OF TOWN AND COUNTRY PLANNING (Mr. KING): So long as the cottage is reserved for members of the agricultural population the Central Land Board do not collect development charge. The term "agricultural population" as defined in the Housing Acts includes a retired agricultural worker and his widow. [23rd November.

WAR-DAMAGE CLAIMS (LOSS OF RENT)

Mr. PETER FREEMAN asked the Chancellor of the Exchequer whether he will introduce legislation to permit compensation in cases of war damage for loss of rent because of delays in rebuilding beyond the control of the owner.

Sir S. CRIPPS: No, sir. I am afraid that this is only one of many types of loss which must be regarded as outside the field of public compensation. [23rd November.

INCOME TAX DEMANDS

Mr. KEELING asked the Chancellor of the Exchequer whether he has considered Vaisey, J.'s strictures on the Inland Revenue Department's practice of harrying individuals to pay income tax promptly while allowing the tax due from companies to be outstanding for a number of years; and what action he proposes to take.

Sir S. CRIPPS: There is no such practice. The Inland Revenue is concerned to obtain prompt payment from companies and individuals alike, but it will be understood that in particular cases there may be difficulty in reaching a determination of the liability.

Mr. KEELING: But is the Chancellor aware that the judge in addressing counsel for the Inland Revenue said, "If you had not paid your income tax since 1941 you would be languishing in gaol," and does not the Chancellor think that the wide difference in treatment meted out to different classes of taxpayers in arrears ought to be narrowed?

Sir S. CRIPPS: There is no such difference at all. [23rd November.

RECENT LEGISLATION

STATUTORY INSTRUMENT 1948

No. 2506. **Coal Industry Nationalisation** (Superiorities) Regulations, 1948. November 18.

COMMAND PAPERS (SESSION 1948–49)

No. 7562. **Legal Aid and Solicitors** (Scotland) Bill. Explanatory memorandum on Legal Aid and Advice.

No. 7566. **Marriage Guidance.** Report of the Departmental Committee on Grants for the Development of Marriage Guidance.

No. 7565. **Medical Partnerships.** Report of the Legal Committee.

HOUSE OF COMMONS PAPER (SESSION 1948–49)

No. 13. **Register of Temporary Laws** for the 3rd and 4th Sessions of the 38th Parliament of the United Kingdom of Great Britain and Northern Ireland.

[The above may be obtained from the Publishing Department, S.L.S.S., Ltd., 88/90, Chancery Lane, W.C.2.]

TO-DAY AND YESTERDAY

LOOKING BACK

On 3rd December, 1771, the Gray's Inn Benchers were concerned with a variety of matters: "Ordered that the Nisi Prius Office be repaired, painted and whitewashed. Ordered that the allowance for the officers' and servants' commons in the dining room and kitchen, on account of the dearness of provisions, be at the rate of £3 10s. per week, instead of the ancient allowance of £2 16s. 10d. per week, the same to commence from the beginning of Michaelmas Term, 1770. New gates to be made for the entrance into Fulwood's Rents." The Nisi Prius Office was in Page's Buildings which then stood across the west end of Field Court. The Inns of Court were very handy for the public offices of the law. There were the Crown Office and the King's Bench Office in the Temple and the Six Clerks' Office in Lincoln's Inn. In Gray's Inn, besides the Nisi Prius Office, there were the offices of the Duchy of Lancaster and of the Commissioners for licensing hawkers and pedlars. On 26th November, 1711, the Benchers were "expecting overtures about taking a lease of some ground in the Walks for building an office for the Stamp Office" and authorised those of their number who should be in town at the time to negotiate. The matter, however, does not seem to have come to anything. The Nisi Prius Office occupied chambers on the ground floor of Page's Buildings at least from 1721, the actual tenant being a member of the Society named Thomas Gooding. In 1727 they were in danger of being padlocked by the Society, which was having a dispute with him over his refusal to accept his call to the Bench.

NOEL PEMBERTON BILLING

The recent death of Noel Pemberton Billing will vividly recall to all lawyers the story of that unique prosecution at the Old Bailey of which he was the central figure. The trial took place in May, 1918, during a very dark period of the first World War. The charge was criminal libel of the most sensational character. In a paper called the *Vigilante*, of which Pemberton Billing was the editor, there had appeared, under a sensational heading expressly referring to the cult of sexual perversion, the following paragraph: "To be a member of Maud Allen's private performances of Oscar Wilde's Salome one has to apply to 9 Duke Street, Adelphi, W.C. If Scotland Yard were to seize the list of these members, I have no doubt they would secure several thousand of the first 47,000." This was a reference to a Black Book of the names of 47,000 British perverts said to have been compiled for blackmailing purposes by the German secret service. Pemberton Billing, who pleaded justification, conducted his own defence before Mr. Justice Darling, who, as senior King's Bench judge and acting Chief Justice, elected to try the case. The accused started off by charging him with prejudice and throughout the proceedings went the limit in attacking him, ignoring all the rules of evidence and the restraints of good manners. Cheering symphathisers filled the court where the wildest allegations were shouted by the witnesses. By night mobs smashed the windows of unfortunate people whose names had been recklessly dragged in. The summing-up was punctuated by intermittent uproar, interruptions, hissings and the ejection of uproarious members of the public. Pemberton Billing was triumphantly acquitted.

LITTLE KNOWN FACTS

Some interesting facts about the case are not generally known. In the first place Pemberton Billing never saw the offending paragraph until he read it already printed in the paper. After completing the preparation of that particular issue he had gone off to attend the House of Commons, and in his absence the printers rang up to say there was a space that needed filling. It was his assistant who composed the paragraph to meet the case, but when the trouble came Pemberton Billing as editor took the responsibility. At first, curiously enough, he intended to plead guilty and it was only after taking legal advice that he filed a plea of justification. Mr. Vachell, K.C., and Mr. L. G. H. Horton-Smith saw the importance of the incautious overloading of the charge which brought in the Black Book matter, and on that basis they drafted a very skilful plea of justification. Their client was anxious that they should appear for him, but apparently the manner in which he wished the defence conducted made it impossible for them to accept. Darling afterwards compared his position to that of a football referee, "with the captain of one team telling the referee that he knew nothing of the rules and that when he mentioned what the rules were he did not mean to abide by them; and, to make the parallel complete, the captain of the team would have, from time to time, to request the referee to order on to the ground someone who was not a player in order that he might kick him or her."

NOTES AND NEWS

Honours and Appointments

Mr. F. W. Chamberlain, C.B.E., J.P., has been appointed High Sheriff of Kent for 1949. He was admitted in 1913.

Mr. T. D. Barlow has been appointed Senior Assistant Solicitor in the Town Clerk's Department at Portsmouth. He was admitted in 1947.

Mr. E. A. Morris, LL.B., has been appointed Junior Assistant Solicitor in the Town Clerk's Department at Portsmouth. He was admitted in 1947.

Mr. R. A. Neave has been appointed Assistant Solicitor in the Town Clerk's Department at Portsmouth.

The Right Hon. Sir David Maxwell Fyfe, K.C., M.P., has been elected Treasurer of the Honourable Society of Gray's Inn for the year 1949 in succession to Sir Harold Derbyshire, M.C., K.C., who has been elected Vice-Treasurer for the same period.

PRACTICE DIRECTION BY THE JUDGES OF THE CHANCERY DIVISION SUPPLEMENTAL TO THE DIRECTION OF THE 7TH JULY, 1948, FOR FIXING DATES FOR THE HEARING OF WITNESS ACTIONS IN THE CHANCERY DIVISION

All available dates down to the 18th March, 1949, having now been allocated, it is directed that after the 3rd December, 1948, no appointments will be given to attend before the Master in Charge to fix a date for the trial of any Action. Such appointments will be resumed on and after the 9th February, 1949.

Paragraphs 6 and 7 of the Practice Direction of the 7th July, 1948 (which relate to altering dates already fixed and notifying the settlement of Actions) remain unaffected by this direction, and any application for special consideration in cases of exceptional urgency may be made at any time.

24th November, 1948. A. H. Holland,
Chief Master (Chancery Division).

SUPREME COURT CHRISTMAS VACATION, 1948

Notice is hereby given that an Order has been made under Rules 6 and 9 of Order LXIII closing the offices of the Supreme Court from 12.30 p.m. on Friday the 24th December to Tuesday the 28th December, 1948, inclusive.

The Order does not apply to the District Registries of the High Court, each of which will be closed on the same days as the local County Court Office. (See Order LXIII Rule 10.)

COURT PAPERS

SUPREME COURT OF JUDICATURE

MICHAELMAS SITTINGS, 1948

COURT OF APPEAL AND HIGH COURT OF JUSTICE
CHANCERY DIVISION

ROTA OF REGISTRARS IN ATTENDANCE ON GROUP A

Date	Emergency Rota	Appeal Court I	Mr. Justice Vaisey *Business as listed*	Mr. Justice Roxburgh *Witness*
Mon., Dec. 6	Mr. Adams	Mr. Hay	Mr. Farr	Mr. Hay
Tues., ,, 7	Andrews	Farr	Adams	Farr
Wed., ,, 8	Jones	Adams	Andrews	Adams
Thurs., ,, 9	Reader	Andrews	Jones	Andrews
Fri., ,, 10	Hay	Jones	Reader	Jones
Sat., ,, 11	Farr	Reader	Hay	Reader

	Group A		Group B	
Date	Mr. Justice Wynn Parry *Non-Witness*	Mr. Justice Romer *Witness*	Mr. Justice Jenkins *Non-Witness*	Mr. Justice Harman *Business as listed*
Mon., Dec. 6	Mr. Reader	Mr. Adams	Mr. Andrews	Mr. Jones
Tues., ,, 7	Hay	Andrews	Jones	Reader
Wed., ,, 8	Farr	Jones	Reader	Hay
Thurs., ,, 9	Adams	Reader	Hay	Farr
Fri., ,, 10	Andrews	Hay	Farr	Adams
Sat., ,, 11	Jones	Farr	Adams	Andrews

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Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).